

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY, APPELLANT,

vs.

**Z. M. McCARROLL, COMMISSIONER OF REVENUES
FOR THE STATE OF ARKANSAS**

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED JUNE 25, 1940.

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

SUPERIOR BATH HOUSE COMPANY, Appellant,

v.

Z. M. McCARROLL, Commissioner of Revenues for the State
of Arkansas, Appellee

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 22, 1940

To Mr. C. R. Stevenson, Clerk of the Supreme Court of the
State of Arkansas:

You will please prepare the record upon appeal of the
above named appellant to the Supreme Court of the United
States, from the final judgment and decision of the Supreme
Court of Arkansas, entered in said cause in favor of Z. M.
McCarroll, Commissioner of Revenues for the State of
Arkansas, appellee, and include in such record the fol-
lowing:

(1) The original Petition for Appeal to the Supreme
Court of the United States, with the Assignment of Errors
and Prayer for Reversal attached thereto.

(2) The Statement of Jurisdiction and appellees' reply
thereto.

(3) The original Allowance of Appeal.

(4) A copy of the Bond and its approval.

(5) The original Citation with proof of service thereon.

(6) A copy of the opinion of the Supreme Court of the
State of Arkansas in such cause.

(7) A copy of the minutes of said Court with reference
to said cause.

(8) A copy of the Petition for Rehearing of the above
named appellant.

(9) A copy of the record on appeal to said State Supreme
Court from the Pulaski Chancery Court, including the ex-
hibits thereto annexed and admitted in said cause.

[fol. 2] (10) Statement showing the filing of such Bond
and the lodgment of copies of the Allowance of Appeal in
your office.

(11) A return to such Allowance of Appeal and a state-
ment of costs.

(12) Proof of service of Praeipe, Assignment of Errors, and Statement of Jurisdiction.

(14) A copy of this Praeipe.

Please certify the same to the said Supreme Court of the United States under your seal, in accordance with the rules of said Court and the laws of the United States upon such appeals.

Terrell Marshall, E. R. Parham, Attorneys for Appellant, Residence and Post Office Address, Little Rock, Arkansas.

Dated this the 22 day of May, 1940.

[File endorsement omitted.]

[fol. 3] [Caption omitted]

[fol. 4] IN CHANCERY COURT OF PULASKI COUNTY

No. 60176

SUPERIOR BATH HOUSE COMPANY, Plaintiff,

v.

Z. M. McCARROLL, Commissioner of Revenues for the State of Arkansas, Defendant

COMPLAINT—Filed January 30, 1940

Plaintiff, for cause of action, says that it is a corporation organized under the Laws of the State of Arkansas and that its office and only place of business is situated on the United States Government Reservation in Garland County, Arkansas, known as Hot Springs National Park; that the sole business in which the Plaintiff is engaged consists of operating a bath house under a lease from the Secretary of the Interior of the United States on said Reservation, a copy of which lease is attached hereto, marked "Exhibit A" and made a part hereof, and that it maintains no office nor does it transact any business at any other place whatsoever.

Plaintiff says that the Defendant, Z. M. McCarroll, as Commissioner of Revenues for the State of Arkansas, is charged with the administration and enforcement of Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, known as the Income Tax Act, and, as such, has assessed and is attempting to collect from the Plaintiff a tax at the rate of 2% per annum on its net income for the years 1928 to 1938, inclusive, based on its operations and business aforesaid.

That, on the 18th day of February, 1939, the said Commissioner of Revenues made an assessment against the Defendant for income tax, in accordance with his construction of said Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, for the period aforesaid, on which assessment he is threatening to issue an execution and illegally and wrongfully sell the property of the Plaintiff for the satisfaction of the tax alleged to be due and that, [fol. 5] unless he is restrained from issuing said execution and making said illegal and wrongful sale, the Plaintiff will be deprived of its property, for which act it will have no complete and adequate remedy at law, to its irreparable loss and damage.

Plaintiff says that exclusive jurisdiction over the area to which its operation has been confined was ceded to the United States by Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903, reserving only the right to tax under authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation, as accorded to the State of Arkansas by Act of Congress of March 3, 1931, c. 533, par. 5, 26 Stat. 855, which cession was accepted by the United States under Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187, which said lands had been, prior to said legislative enactments, forever dedicated to public use by Act of Congress of April 20, 1932, 4 Stat. at L. 505, par. 3, and Act of Congress of December 16, 1878, c. 5, 20 Stat. 258.

Plaintiff says that, at all times since said Acts of Cession and Acceptance, the United States has exercised sovereignty over said ceded lands, with the exception of the right to tax accorded the State of Arkansas by said Act of Congress of March 3, 1891, supra.

Plaintiff states that Act No. 220 of the Acts of Arkansas for 1931 exempts corporations organized under the laws of this State to do business outside the State from the payment of all income and intangible property taxes and that Act No. 118 of the Acts of Arkansas for 1929, as construed by the Defendant and as applied to the Plaintiff in this case, when read in connection with said Act No. 220 of the Acts [fol. 6] of Arkansas for 1931, constitutes an unconstitutional discrimination and classification and denies to the Plaintiff the equal protection accorded it under Amendment XIV to the Constitution of the United States and is in violation of the prohibition contained in said Amendment.

Plaintiff states that the act of the Commissioner in threatening to levy on and sell its property located on said United States Government Reservation for a tax alleged to be due by reason of Plaintiff's operations conducted solely on said Reservation would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

Plaintiff states that Act No. 220 of the Acts of Arkansas for 1931 exempts corporations organized under the laws of this State to do business outside the State from the payment of all income and intangible property taxes and that Act 118 of the Acts of Arkansas for 1929, as construed by the Defendant and as applied to the Plaintiff in this case, when read in connection with said Act No. 220 of the Acts of Arkansas for 1931, constitutes an unconstitutional discrimination and classification and denies to the Plaintiff the equal protection accorded it under Article II, Section 8, of the Constitution of the State of Arkansas and is in violation of the prohibition contained in said provision.

That the Action of the Defendant, as Commissioner aforesaid, in the construction and application of said Act No. 118 of the General Assembly of the State of Arkansas for 1929 to Plaintiff's operations is repugnant to said Acts of Congress of April 20, 1932, December 16, 1878, March 3, 1891, and April 20, 1904, and the construction placed on said Acts by the Courts of the United States.

Plaintiff says that, within the time prescribed by said Act No. 118 of the Acts of Arkansas for the year 1929, it prepared and submitted a corporation income tax return for the year 1928 and filed the same with the Commissioner of Revenues of the State of Arkansas under which it made the claim that "This Company is operating under a lease with

the Department of the Interior, and the bath house is situated in the Hot Springs National Park and is not subject to tax under this law", which return was accepted by David A. Gates, as Commissioner of Revenues of the State of Arkansas, and at this date the Commissioner determined that Plaintiff was exempt from the exaction of said tax, which determination was not varied until the demand of the Defendant, as Commissioner of Revenues, for the preparation and filing of a return by the Plaintiff and a payment of the tax, on or about the 18th day of January, 1939, and the Plaintiff says that the Defendant is barred from the collection of the income tax accruing during the years 1928 to 1938, inclusive, by reason of said departmental ruling.

Plaintiff says that the collection of the tax on income for the years 1928 to 1935, inclusive, is barred by the Statute of Limitations, which it specifically pleads.

Wherefore, Plaintiff prays that the Defendant be permanently enjoined from the collection of said tax on an assessment for any year since the passage of said Act No. 118 of the Legislature of the State of Arkansas for 1929 from the issuance of any warrant or execution for the collection thereof and from the levy on or sale of any property of the Plaintiff for the satisfaction thereof, and for all other proper relief.

E. R. Parham, Solicitor for Plaintiff.

[fol. 8] EXHIBIT "A" TO COMPLAINT

This Agreement made and entered into this 25th day of July, 1938, by and between the United States of America, Acting in this behalf of Oscar L. Chapman, Assistant Secretary of the Interior, party of the first part, and hereinafter referred to as the Secretary, and the Superior Bath House, a corporation organized and existing under the laws of the State of Arkansas, its successors and assigns, party of the second part, hereinafter referred to as the Company,

Witnesseth: That pursuant to the provisions of a joint resolution of Congress, approved March 26, 1888 (25 Stat. 619), entitled "Joint Resolution to enable the Secretary of the Interior to utilize the hot water running to waste on the permanent reservation at Hot Springs, Arkansas", and of an Act of Congress approved March 3, 1891 (26 Stat. 842),

entitled "An Act to regulate the granting of leases at Hot Springs, Arkansas, and for other purposes", the parties hereto have mutually agreed and by these presents do mutually agree to and with each other as follows:

I. In consideration of the rents, covenants and stipulations hereinafter mentioned, reserved and contained, the Secretary hereby grants and leases unto the Company the plot of ground in the Hot Springs National Park, Arkansas, on which is located the Superior Bath House, more particularly described as follows:

Bath House Site No. 11, commencing at a point fifteen feet northerly from Station 11 on the building line of the Reservation Front, indicated on the plan formulated and filed in the Interior Department by the Superintendent of the Hot Springs Reservation May 12, 1891; running thence in a northerly direction along said Reservation Front for a distance of 85 feet; thence an angle of 91 degrees and 21 minutes to the right and in an easterly direction for a distance of 96.8 feet; thence an angle of 90 degrees to the right and in a southerly direction for a distance of 25.6 feet; [fol. 9] thence an angle of 90 degrees to the right and in a westerly direction for a distance of 40.7 feet; thence an angle of 90 degrees to the left and in a southerly direction for a distance of 4 feet; thence an angle of 90 degrees to the right and in a westerly direction for a distance of 4.3 feet; thence an angle of 90 degrees to the left and in a southerly direction for a distance of 53.8 feet; thence an angle of 90 degrees to the right and in a westerly direction for a distance of 49.8 feet to the place of beginning, the foregoing description being the same as that indicated on blueprint of plat of ground occupied by the Superior Bath House, Hot Springs, Arkansas, dated December, 1915, hereto attached and forming a part hereof.

II. To Have and To Hold for the term of twenty (20) years, commencing on the first day of January, 1938, and ending on the thirty-first day of December, 1957; together with the use of the hot waters from the Hot Springs National Park, for the purposes and only upon the terms and conditions herein mentioned; subject to the provisions of all existing laws of the United States and of such laws as may hereafter be enacted by Congress relative to, about or concerning the Hot Springs National Park, or the waters

thereon, and the rules and regulations that have been, or may hereafter be, made and established by the Secretary of the Interior pursuant to any such acts of Congress, which are accepted and made a part thereof in the same manner and to the same effect as if such acts or rules and regulations, or their several provisions, were specifically set forth herein.

III. In Consideration Whereof, the Company agrees to maintain and operate a bath house on said site within twenty *twenty* (20) bath tubs and all necessary appliances for providing baths to the public and to pay to the Secretary rental at the rate of eighty (\$80.00) dollars per tub per annum for each and every bath tub allowed in said bath house, and whether erected or used or not, to be paid in advance in quarterly installments at the office of the super-[fol. 10] intendent of the park, subject to such changes as to rate as by law may be established and subject to the right of the Secretary, hereby reserved and acknowledged, to readjust and increase the amount of rent herein provided for to such sum per tub as he may deem just whenever during the continuance of this lease it may become necessary, and to meter the hot water and adjust the rate of rental on the basis of the actual amount of hot water furnished, whenever and if during the continuance of this lease such action may be deemed necessary: Provided, That the Secretary may fix the rate of charges for baths in said bath house, including the services of attendants, which rate of charges shall be kept continuously posted in the bath house by the Company; and the Company shall in no event charge other than such rates for baths therein, or enter into any combinations with the lessees of other bath houses on or near the Hot Springs National Park to fix the prices in violation of or different from the rates thus fixed. The number of tubs let may, in the discretion of the Secretary, be diminished or increased within the limit authorized by law, commencing from the first day of July in any year during the continuance of this lease, either upon his own motion or upon the written application of the Company to him to make such change, and rent shall then be paid for the number of tubs allowed; but there shall be no obligation on the part of the Secretary to supply hot water from the springs or reservoirs if at any time, in the judgment of the Secretary, said water shall not be sufficient; and for failure to furnish water in any case there shall be

no claim or demand of any kind against the United States or the Secretary.

IV. And the Company agrees to keep and maintain the said bath house and premises continuously in complete repair and good condition with a sufficient number of courteous and skilled attendants and servants, in all particulars, as a first class bath house, and shall keep the furniture, furnishings and equipment in a first class condition and refit [fol. 11] and reequip the same whenever in the judgment of the Secretary the circumstances require it. In case the bath house or any of its furnishings or equipment be destroyed by fire, or otherwise, during the term of this lease the Company shall replace the same with a building and furniture, furnishings and equipment upon plans or specifications approved by the Secretary, or the site shall be immediately cleared and restored to its original condition by the Company and in a manner satisfactory to the Secretary.

In order that the resources of the Company may be conserved properly to enable it to keep its facilities at the standards deemed necessary by the Secretary, and that its capital will not be impaired the Company agrees to declare dividends payable in cash or in property only by the payments to shareholders as follows:

(a) Out of earned surplus, that is, the accumulate earnings in excess of losses or the amount by which the net assets exceed the capital stock and liabilities; or

(b) Out of net profits earned during the preceding accounting period of one year, even though at the close of that period there is no credit balance in the surplus account; Provided, That approval of the Secretary shall have been first obtained in writing; or

(c) Out of paid-in surplus or surplus arising from reductions of stated capital; Provided, that approval of the Secretary shall have been first obtained in writing, and also provided that notice shall be given the shareholders receiving such dividends of the source thereof prior or concurrent to the payment thereof.

(d) If the value of the net assets, by reason of depreciation, losses or otherwise amounts to less than the aggregate amount of stated capital the corporation shall not declare dividends out of net profits pursuant to subdivision (b) of

this section, until the value of the net assets have been restored to such aggregate amount of the stated capital, or until approval of the Secretary shall have been first obtained in writing.

(e) No dividends will be declared when there is reason-[fol. 12] able ground for believing that thereafter the Company's debts and liabilities will exceed its assets, or that it would be unable to meet its debts and liabilities as they mature.

(f) No dividends will be declared out of the mere appreciation in value of the assets not yet realized, nor shall any dividends be declared from earned surplus representing profits derived from an exchange of assets and until such profits have been realized, or unless the assets received are currently realizable in cash.

(g) The Company agrees to declare dividends payable in shares or stock of the Company, or reduce the stated value of its shares, or number of shares only when in the discretion of the Secretary such action is deemed advisable and upon the prior approval of the Secretary in writing.

V. The company shall, at its own expense, securely and adequately, with the best material, wall, curb and cement the bottoms and sides and cover all hot-water springs now on the said site, or which may be developed on the same by any excavations made thereon, and securely pipe the same to the exterior limits thereof, connect that same in such manner and at such point or points as the Superintendent of the Park may designate, for utilization at receiving reservoirs or pumping stations or otherwise; and construct and maintain ways of access to all such springs at all times available to the Superintendent or any agent of the Secretary; also keep the grounds and walks attached to or under in connection with said bath house in a clean condition and free from litter and rubbish, to the satisfaction of the Superintendent. The Company shall also provide and maintain, at its own expense, ample and safe sewerage and drainage, with all necessary appliances, conducted on the best principle to secure sanitary conditions, and particularly to protect from contamination all springs situated on said site; and keep the same in such condition, to the satisfaction of the Superintendent.

VI. All blasting on said site and all excavations upon [fol. 13] the same shall be made only upon the permission and by direction of the Superintendent; and nothing herein contained shall be construed as a grant unto the Company of any exclusive right either to the waters of any spring that may be upon the land hereby leased, or elsewhere, nor to bore for water upon said lands, nor to any exclusive right to anything whatever save the possession of the premises hereby leased, nor as a grant to appropriate or use the premises or any part thereof otherwise or to any degree than as herein set forth nor to devote said building in whole or in part to any other purpose than herein expressed, or willfully permit the waste or use of the hot water furnished for other than bathing or drinking purposes. The Superintendent of the Park or other authorized agent or representative of the Secretary shall at any time have access to said bathhouse and premises, and every part thereof, for purposes of inspection.

VII. The Company, or its successors, or assigns, shall not during the life of this lease be interested, as lessee, assignee, owner, director, manager or otherwise, in any other bath house, bath house interest, or hot water privilege, at or near Hot Springs, as a stockholder in any corporation so interested, except by the approval of the Secretary upon formal application; and it will not enter into any combination or pool with any other party so interested to share any profits or leases of bath house business, or share any rates or charges or of accum-odations to be furnished or of other management of this or other bath houses at or near Hot Springs, Arkansas.

VIII. The Company will not employ any agents or drummers to solicit patronage for said bath house, nor pay, nor cause to be paid, directly or indirectly, any drummer or agent for any such solicitation, nor permit the same to be done by any agent, servant, attendant, employees, or rubber employed in or about said bath house, or permitted to work therein, and any violation of this provision shall cause the immediate forfeiture of this lease; and the Company shall, [fol. 14] when required by the Secretary, render to — during the life of this lease a monthly statement of the receipts and expenditures of said bath house, together with a statement of the number of baths daily administered therein, attested by the affidavit of the manager in charge.

IX. Neither this lease nor any interest therein shall be assigned, transferred or sublet by the Company to any person or persons, corporation or corporations, unless such assignment be first approved in writing by the Secretary, and any such attempted assignment or transfer, without such approval, shall not only be entirely void but such act of attempted assignment, unless approved, shall, of itself, cause the immediate forfeiture of this lease, the same in all particulars and results as if the term hereof had expired absolutely by limitation; all rights of action, however, being reserved by the United States for any breach of this contract by the Company.

X. It is agreed that in case of default of payment of rent as herein stipulated, or if the Company shall fail to keep and observe any and all covenants hereof, or if it violates any of the regulations or any of the provisions of the statutes relating to the Hot Springs National Park, then and in either event, after the presentation of the facts and on recommendations by the Superintendent of the Hot Springs National Park to the Director of the National Park Service the latter shall, with the approval of the Secretary, withhold the use of hot water for a period of thirty days, during which period the Company shall have the opportunity to appeal to the Secretary for a further review of the matter and if at the expiration of the period of thirty days and the conclusion of the further review the Secretary still approves of the recommendation of the Superintendent of the Park, then this lease and all rights or privileges hereunder shall be forfeited at the option of the Secretary, and the term hereof ended, and the said premises may be taken possession of on behalf of the United States in the same manner as if the full term of the lease had expired, except as hereinafter [fol. 15] provided, but there shall be ten days' notice to the Company thereof by service upon its representatives or placed conspicuously on the premises.

XI. It is further agreed that if, on the expiration of this lease by limitation of time, the premises shall be leased to someone other than the Company, the latter shall be given the opportunity to be reimbursed for the reasonable value of such of its buildings, fixtures, stock, equipment and other property thereon as the Secretary may, by an inspection made within six months prior to

such termination, determine to be appropriate for use on said premises and in enhancement of the value thereof for the purpose of conducting a bath house. The value of such property shall then be ascertained by a board of three appraisers appointed as follows: At least ninety days before the expiration of this lease, the Secretary and the Company shall choose one appraiser, and the two so selected shall then choose a third. If they do not within thirty days of their designation agree upon a third appraiser, then the Secretary shall select such third appraiser. The salary and expenses of this third appraiser shall be paid by the Company. This board, or a majority thereof, shall within thirty days from the designation of the third member, and after an inspection of the property to be appraised and the taking of such testimony as may be adduced by the parties in interest, report their findings to the Secretary who may approve, set aside or modify the same, or order a new appraisal as he may see fit.

The value of such buildings and property when determined by the Secretary, whose decision in the premises shall be final, shall be paid at the time and in the manner directed by him, to the Company hereunder by the person, company, corporation or association to whom the premises are to be leased; Provided, that nothing herein shall be construed as creating a claim against the United States, or shall prevent the Secretary from leasing or subletting said property and the improvements thereon in such manner and upon such terms as may be necessary for the full [fols. 16-17] protection of the interests of the Government, or shall delay the surrender of the premises with all buildings, fixtures and appurtenances thereon upon any termination of this contract, or shall in any manner charge the Government for the use of such buildings or property.

XII. It is hereby distinctly understood that no exclusive privileges are, or are intended to be, created by this lease, but the same are hereby prohibited; and the terms hereof shall be so construed as to carry this understanding and agreement in this particular into complete effect.

XIII. No Member of Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this

contract if made with a corporation or company for its general benefit.

In Witness Whereof the parties hereto have caused these presents to be executed and their seals affixed the day and year first above written.

Oscar L. Chapman (Signed), Assistant Secretary
of the Interior. Superior Bath House, by Robt.
H. Kittleberger, Pres.

Attest: W. F. Poke, Secty. Treas.

[File endorsement omitted.]

[fols. 18-19] IN PULASKI CHANCERY COURT

[Title omitted]

DEMURRER—Filed February 1, 1940

Now comes the Defendant and demurs to the Complaint of the Plaintiff herein, and for grounds thereof states:

1. Said Complaint does not contain allegations of fact sufficient to constitute a cause of action against the Defendant.

2. Defendant is not barred from collecting State income tax from Plaintiff for the years 1929 to 1938, inclusive, by the determination of a prior Commissioner of Revenues that Plaintiff was not subject to the payment of State income tax.

3. Defendant is not barred from collecting State income tax from Plaintiff for the years 1929 to 1935, inclusive, by the Statute of Limitations imposed by Section 26 of the State Income Tax Law.

Frank Pace, Jr., Lester M. Ponder, Solicitors for
Defendant.

[File endorsement omitted.]

[fol. 20] IN CHANCERY COURT OF PULASKI COUNTY

No. 60176

SUPERIOR BATH HOUSE COMPANY, Plaintiff,

v.

Z. M. McCARROLL, Commissioner of Revenues for the State
of Arkansas, Defendant

DECREE—February 9, 1940

Now on this 7th day of February, 1940, this cause comes on to be heard before the Court upon the Complaint filed herein, and the Specific Demurrer of Defendant thereto, both parties being represented by their respective Attorneys. And the Court being well and sufficiently advised as to the Law in this case does hereby make the following Order:

That Defendant's Demurrer be sustained as to the failure of Plaintiff's Complaint herein to state a cause of action against Defendant.

That Defendant's Demurrer be sustained as to the contention of Plaintiff that Defendant is barred from collecting State Income Tax from Plaintiff for the years 1929 to 1938, inclusive, by the determination of a prior Commissioner of Revenues that Plaintiff was not subject to the payment of State Income Tax.

That the Defendant's Demurrer be overruled as to Plaintiff's contention that Defendant is barred from collecting State Income Tax from Plaintiff for the years 1929 to 1935, inclusive, by the Statute of Limitations imposed by Section 26 of the State Income Tax Law.

Plaintiff and Defendant duly excepted to the action of the Court at the time and asked that their exceptions be noted of record, which is hereby done. And Plaintiff refused to plead further and elected to stand upon its Complaint.

It is, therefore, by the Court considered, ordered and adjudged that Plaintiff's cause of action be and the same is hereby dismissed, and Defendant shall have and recover [fol. 21] of and from the Plaintiff all his costs herein paid, laid out and expended, for which execution may issue.

Plaintiff thereupon prayed an appeal to the Supreme Court of Arkansas from the action of the Court in sus-

taining Defendant's Demurrer in part, which is hereby granted.

And Defendant thereupon prayed a cross-appeal to the Supreme Court of Arkansas from the action of the Court in overruling his Demurrer in part, which is hereby granted.

February 9, 1940.

(Chancery Record 116, page 574)

[fol. 22] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 23] IN SUPREME COURT OF ARKANSAS

No. 5959

SUPERIOR BATH HOUSE COMPANY, Appellant,

v.

Z. M. McCARROLL, Commissioner, Appellee

Appeal from Pulaski Chancery Court

JUDGMENT—April 1, 1940

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County and was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said chancery court in this cause except in this: The court erred in holding that the appellee, by limitation, lost his right of action to collect tax on income of appellant for the years 1929 to 1935 inclusive.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, except with respect to the error aforesaid, affirmed, and that on the cross appeal of the appellee, and for the error aforesaid, the said decree be reversed in so far as it holds that appellee is not entitled to collect the tax for the years 1929 to 1935 inclusive, and that this cause be remanded to said chancery court for further proceedings to be therein had according to the principles of equity, and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellee recover of said appellant all his costs in this court in this cause expended, and have execution thereof.

[fol. 24]

IN SUPREME COURT OF ARKANSAS

No. 212

SUPERIOR BATH HOUSE COMPANY

v.

McCARROLL, Commissioner of Revenues

OPINION—April 1, 1940

GRIFFIN SMITH, C. J.:

The suit from which this appeal proceeds was one to enjoin the commissioner of revenues from collecting taxes on incomes for 1928 to and including 1938.¹ A special demurrer was filed on behalf of the commissioner. The complaint was dismissed in respect of taxes for 1936, 1937, and 1938. As to collections sought to be enforced for other years mentioned in the complaint, it was held that by limitation the commissioner had lost his right of action.²

Appellant's income is derived from personal services and use of property on Hot Springs Reservation, in Garland County.³ It is insisted that exclusive jurisdiction over the Reservation has been ceded to the United States, and that Arkansas reserved only the right to tax, under laws of the state applicable to equal taxation of personal property, the structures erected on leases and other personal property in private ownership.

There is the further contention that act 220 of the Arkansas General Assembly, approved March 26, 1931, exempts from payment of the tax domestic corporations doing business entirely without the state, and that act 118 of 1929, "as applied to the appellant in this case, when read in con-

¹ Act 118, approved March 9, 1929.

² Section 26 of Act 118, *supra*.

³ Act 30 of the General Assembly of Arkansas, approved February 21, 1903.

nection with act 220, constitutes an unconstitutional discrimination and classification against the appellant, and denies to it the equal protection accorded under the Fourteenth Amendment,⁴ * * * [and is violative of] Art. 2, Sec. 8, of the constitution of Arkansas."

Appellant avers that a return on its income for 1928 was filed in 1929 in a timely manner; that with the return it claimed exemption because operations productive of earnings were conducted under a lease from the department of the interior; that the commissioner's ruling was consonant with the claimed exemption, and that no further demand had been made until January, 1939.

By act of March 3, 1891, c. 533, Sec. 5, 26 Stat. 844, U. S. Code Annotated, Title 16, Sec. 365, consent of the United States was given "for taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that state, as personal property of all structures and other property in private ownership on the Hot Springs National Park".

By act 30 of the Arkansas General Assembly, approved February 21, 1903, exclusive jurisdiction over the Hot Springs Reservation was "ceded and granted" the United States, with the proviso, however, that the act should not prevent the execution of any process of the state, civil or criminal, on any person who may be on such reservation or premises; provided further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the state. [by act of 1891] is hereby reserved to the state of Arkansas."

Subsequent to approval of act 30, supra, the Congress enacted that "All fugitives from justice taking refuge within [the boundaries of the Reservation] shall, on due application to the executive of [Arkansas], whose warrant may lawfully run within said territory for said purpose, be subject to the laws which apply to fugitives from justice found in the state of Arkansas. Said section shall not be

⁴ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries [described], accorded to the state of Arkansas by Sec. 365 of [Title 16, United States Code Annotated"].⁵

Buckstaff Bath House Company v. McKinley, Commissioner,⁶ upheld validity of the Arkansas unemployment compensation tax.⁷ It was there said that, "The tax laid by act 155 is not a tax on personal property; nor is it, in *any* sense, a property tax".

[fol. 26] Pollock v. Farmers Loan & Trust Company classifies a ⁸ tax on the income from real and personal property as a direct tax on the property.

Stanley v. Gates, 179 Ark. 886, 19 S. W. 2d 1000, holds that the income tax imposed by the act of 1929 is not a property tax. Mr. Justice Hart (later Chief Justice) who wrote the opinion in the Stanley-Gates Case, said: "It has been well said that 'a tax on income is not a tax on property, and a tax on property does not embrace incomes'. Hence, a majority of the court holds that 'property', as the term is used in art. 16, Sec. 5 of the constitution, means the property itself as distinguished from the annual gain or revenue from it".

The Buckstaff Bath House Case was appealed to the Supreme Court of the United — and affirmed.⁹ Substance of the opinion, written by Mr. Justice Douglas, is that while the state tax for social security is an excise, it comes within the permission granted by congress to tax personal property on the Hot Springs Reservation. The holding is influenced by the social security act of congress, which the court thought gave Arkansas "implied authority" to levy the tax. Concurrence of Mr. Justice Reed is on the ground that the act of congress of 1891 should be interpreted to give consent to the state to levy the excise for unemployment compensation.

We think there is authority in the general language of the act of 1891 for the state to extend to leasees of per-

⁵ U. S. Code Annotated, Title 16, Sec. 372.

⁶ 198 Ark. 91, 127 S. W. 2d 802.

⁷ Act 155, approved February 26, 1937.

⁸ 158 U. S. 601, 617, and 635.

⁹ Supreme Court Reporter for January 1, 1940, Vol. 60, No. 4; Law Ed., Advance Opinions, Vol. 84, No. 4.

sonal property on the Reservation the tax assessed against all other citizens within the state. Although classified as an excise, our income tax is treated by the courts as having many of the characteristics of a property tax. An excise is not within our constitutional provisions limiting the rate of taxes on property and providing for uniformity.

It would be an anomolous situation indeed if we should say that an excise tax levied for unemployment atainst those coming within the law's classification included [fols: 27-28] operations within the Reservation when authority for its exaction came from a state statute as distinguished from congressional authority, but that a tax on incomes levied uniformly against all citizens could not extend to the Reservation because the term "personal property" was used in the act of 1891.

We do not agree with appellant that the Reservation, for purposes of taxation, is not within the state. If this theory were correct the Buckstaff Bath House Case was wrong, for act 155 of the Arkansas General Assembly could have no extra-territorial effect.

The state is not estopped by action of the commissioner of revenues in 1929. It has often been held that the determination by an administrative agent of the state that an assessment made by law is not to be collected does not affect the right of enforcement. The latest decision directly in point is *Southwestern Distilled Products Company, Inc., v. State, ex rel. Humphrey*, Vol. 72 No. 3, Law Reporter for January 29, 1940. The instant case is unlike *State, ex rel. Attorney General, v. New York Life Insurance Company*,¹⁰ where Sec. 13899 of Pope's Digest was held to apply. There the insurance company had declared all premiums upon which a report was required.

In the case at bar appellant, in its report, urged its exemption, and when the commissioner (acting, of course, in good faith) concluded the petitioner was not subject to the tax, no report was made for any of the succeeding six years. Appellant is not subject to the tax for 1928, but will be required to pay for all unreported years.

The decree is affirmed on appeal, and reversed on cross-appeal. The cause is remanded for further proceedings under the law as here declared.

¹⁰ 198 Ark. 820, 131 S. W. 2d 639.

[Title omitted]

• PETITION FOR REHEARING—Filed April 16, 1940

Appellant prays that it be granted a rehearing in this cause, and for reason says:

That the Court has failed to take into consideration that the General Assembly of the State of Arkansas ceded exclusive jurisdiction to the Federal Government over the lands involved, in the year 1903, by Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903, reserving only the right of "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation" as defined in Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844.

That the Court erred in holding that the State Income Tax Act of 1929 had the characteristics of a property tax, within the meaning of "property" in said Act of Congress of March 3, 1891.

That the Court erred in failing to hold that Act No. 220 of the Acts of Arkansas for 1931 in connection with and as a part of Act No. 118 of the Acts of Arkansas for 1929, precluded an assessment and collection of taxes on the income of appellant by the provisions of the equal protection afforded it under Amendment XV to the Constitution of the United States.

[fol. 30] That the Court erred in failing to hold that the act of the Commissioner in threatening to levy on and sell its property located on said United States Government Reservation for an alleged tax by reason of the operations thereon constituted the taking of its property beyond the sovereignty of Arkansas and on account of operations conducted beyond said sovereignty, in violation of Amendment V to the Constitution of the United States.

That the Court's opinion is repugnant to the Acts of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; December 16, 1878, c. 5, 20 Stat. 258; March 3, 1891, c. 533, par. 5, 26 Stat. 844; and April 20, 1904, par. 1, 33 Stat. 187, and the construction placed on said Acts by the Courts of the United States.

That the opinion of the Court in holding that the tax in question was a property tax within the meaning of said Act of March 3, 1891, is contrary to the third paragraph of the preamble to Act No. 118 of the General Assembly of Arkansas for 1929, and the purposes of said Act, in that said Act No. 118, Section 3, par. (b), specifically levies the tax on corporations as an excise and not a property tax, as distinguished from the levy of a tax on the income of property of nonresidents by paragraph (c) of said Section 3, and that the holding of the Court that the tax in question is a property tax within the meaning of said Act of Congress of March 3, 1891, would cause the said income tax levy to be in conflict with Article XVI, par. 5, sub-sec. (a), and Article XVI, par. 8, of the Constitution of the State of Arkansas, in that said tax is not equal and uniform in that it taxes income at a higher rate than other property of equal value, and in that it exceeds the maximum rate of levy on assessed valuation specified in the provisions in the sections of the Constitution aforesaid.

[fol. 31] Wherefore, appellant respectfully prays that a rehearing be granted in this cause.

E. R. Parham, Solicitor for Appellant.

STATE OF ARKANSAS,

County of Pulaski, ss:

I hereby certify that I am the solicitor for the appellant and am familiar with the contents of this petition and motion for rehearing and verily believe that the grounds are well taken, and for that reason the petition and motion is submitted.

E. R. Parham.

Subscribed and sworn to before me this 16th day of April, 1940. L. P. Biggs, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 32] IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—May 13,
1940

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

5959. Superior Bath House Company v. Z. M. McCarroll,
Commr.;

[fol. 33] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed May 22, 1940

To the Chief Justice of the Supreme Court of the State of
Arkansas:

Your petitioner, Superior Bath House Company, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

This cause originated in the Pulaski Chancery Court, in which Court, by the complaint of the plaintiff, there was drawn in question the constitutionality of Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, as amended by Act No. 220 of the General Assembly of Arkansas for the year 1931, in that Act No. 220 of the Acts of Arkansas for 1931 exempts from the payment of all income and intangible property taxes corporations organized under the laws of this State to do business outside the State; that Act No. 118 of Arkansas for 1929 as applied to appellant, when read in connection with Act No. 220 of the Acts of Arkansas for 1931, denied to appellant equal protection accorded it under Amendment XIV to the Constitution of the United States; that the action of the Commissioner in threatening to levy on and sell its property located on the United States Government Reservation of Hot Springs National Park for an alleged income tax due by

reason of appellant's operations which were conducted solely on said Reservation, constituted the taking of its property without due process of law, in violation of Amend-[fol. 34] ment V to the Constitution of the United States; and that the action of the Commissioner in the construction and application of Act No. 118 of the General Assembly of the State of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, to appellant's operations conducted as aforesaid, was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, particularly Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844; Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187; Act of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; and Act of Congress of December 16, 1878, c. 5, 20 Stat. 258; and the decision in said Court was in favor of the constitutionality and the validity of said Act No. 118 of Arkansas for 1929, as amended.

The Supreme Court of the State of Arkansas is the highest court in this State in which a decision in this suit can be had.

In said Court there was drawn in question the constitutionality of Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, as amended by Act No. 220 of the General Assembly of Arkansas for the year 1931, in that Act No. 220 of the Acts of Arkansas for 1931 exempts from the payment of all income and intangible property taxes corporations organized under the laws of this State to do business outside the State; that Act No. 118 of Arkansas for 1929 as applied to appellant, when read in connection with Act No. 220 of the Acts of Arkansas for 1931, denied to appellant equal protection accorded it under Amendment XIV to the Constitution of the United States; that the action of the Commissioner in threatening to levy on and sell its property located on the United States Government Reservation of Hot Springs National Park for an alleged income tax due by reason of appellant's operations which were conducted solely on said Reservation, con-[fol. 25] stituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States; and that the action of the Commissioner in the construction and application of Act No. 118 of the General Assembly of the State of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931,

to appellant's operations conducted as aforesaid, was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, particularly Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844; Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187; Act of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; and Act of Congress of December 16, 1878, c. 5, 20 Stat. 258.

The decision of said Court was in favor of the constitutionality and the validity of said Act No. 118 of Arkansas for 1929, as amended.

Therefore, in accordance with paragraph 237 (a) of the Judicial Code, and in accordance with the rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force, when the Act of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of Arkansas, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order [fol. 36] that the decision and final judgment of said Supreme Court of the State of Arkansas may be examined and reversed, and also prays that a transcript of the record proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Arkansas, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that the bond for costs tendered by the petitioner be approved.

Terrell Marshall, E. R. Parham, Attorneys for Petitioner.

Dated May 22, 1940.

[File endorsement omitted.]

[fol. 37] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ALLOWANCE OF APPEAL—Filed May 22, 1940

The petition of Superior Bath House Company, the appellant in the above entitled cause, for an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Arkansas; having been filed with the Clerk of the Supreme Court of Arkansas and presented therein, accompanied by Assignment of Errors and Statement of Jurisdiction, as provided by Rule 12 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby,

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 1st day of April, 1940, on which a petition for rehearing was entertained and overruled on the 13th day of May, 1940, in the Supreme Court of the State of Arkansas, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Arkansas shall within forty days from this date make and transmit to the Supreme Court of the United States under his hand and seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties, or their counsel herein, in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fol. 38] It is further ordered that said appellant shall give a good and sufficient bond for costs in the sum of \$1,000; that it shall prosecute said appeal to effect and answer all costs if it fails to make good its plea.

Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas.

Dated: May 22, 1940.

[File endorsement omitted.]

[fol. 39] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed
May 22, 1940

Now comes the above appellant and files herewith its petition for an allowance of appeal and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Arkansas erred in holding and deciding that Act No. 118 of the General Assembly of Arkansas for the year 1929, in connection with and as amended by Act No. 220 of the General Assembly of Arkansas for the year 1931, authorized the taxation of appellant's income, which was derived solely from business conducted on the Hot Springs National Park Reservation in Garland County, Arkansas, and where it maintained its only office. The validity of said Act, so far as it attempted to tax appellant's income, was denied and drawn in question by it on the ground that it denied to appellant the equal protection accorded it under Amendment XV to the Constitution of the United States; that the action of the Commissioner in threatening to levy on and sell its property located on said United States Government Reservation under said Act for its income so earned, constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States, and that [fol. 40] said Act as amended was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, particularly Act of Congress of March 3, 1891, c. 533, par. 5, 26 Stat. 844; Act of Congress of April 20, 1904, c. 1400, par. 1, 33 Stat. 187; Act of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; Act of Congress of December 16, 1878, c. 5, 20 Stat. 258; and that the sovereignty over the area affected by the aforesaid Acts was ceded to the United States by Act No. 30 of the General Assembly of Arkansas for 1903, reserving only the right to tax as personal property all structures and other property in private ownership in the Hot Springs National Park.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding:

I

That Act No. 118 of the Acts of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, in taxing appellant's income, did not constitute an unconstitutional discrimination and classification, denying to appellant the equal protection accorded it under Amendment XIV to the Constitution of the United States and that the tax so levied was not in violation of the prohibition contained in said Amendment.

II

In failing to hold and decide that the levy and sale of its property located on said United States Government Reservation for income tax under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931, resulting from business conducted solely thereon, constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

[fol. 41]

III

That Act No. 30 of the General Assembly of Arkansas for the year 1903 reserved to the State of Arkansas the right to tax appellant's income arising from operations conducted solely on the Hot Springs National Park Reservation.

IV

That the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844) and the Act of Congress of April 20, 1904 (33 Stat. 187, 16 U. S. C. A., paragraphs 372-383) by extending to the State of Arkansas the right to tax as personal property all structures and other property in private ownership on the Hot Springs National Park Reservation, authorized the taxation of appellant's income under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931.

V

That by the compact entered into between the United States of America and the State of Arkansas respecting

sovereignty and jurisdiction of the area embraced in the Hot Springs National Park, as reflected by Acts of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; December 16, 1878, c. 5, 20 Stat. 258; March 3, 1891, c. 533, par. 5, 26 Stat. 844; and April 20, 1904, c. 1400, par. 1, 33 Stat. 187; and Act No. 30 of the General Assembly of the State of Arkansas for 1903, the State of Arkansas was not limited to taxation, as personal property, of structures and personal property in said area.

For which errors the appellant, Superior Bath House Company, prays that the said judgment of the Supreme Court of Arkansas dated the 1st day of April, 1940, be reversed and a judgment rendered in favor of the appellant, and for costs.

Terrell Marshall, E. R. Parham, Attorneys for Superior Bath House Company.

[File endorsement omitted.]

[fols. 42-43] Bond on appeal for \$1,000.00 approved and filed May 22, 1940, omitted in printing.

[fol. 44] Citation in usual form showing service on Frank Pace, Jr., filed May 22, 1940, omitted in printing.

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 46] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF APPELLANT'S POINTS ON WHICH IT INTENDS TO RELY, AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION—Filed July 8, 1940.

Appellant adopts its Assignment of Errors as a statement of the points upon which it intends to rely, and states that the entire record, as filed, is necessary for a proper consideration of the case.

Terrell Marshall, E. R. Parham, Attorneys for Appellant.

I acknowledge service for the appellee of the foregoing statement of the appellant of the points on which it intends to rely, and of that part of the record which it considers necessary for the proper consideration of the case.

This the 6th day of July, 1940.

Frank Pace, Jr., Attorney for Appellee.

[fol. 47] [File endorsement omitted.]

Endorsed on cover: File No. 44529, Arkansas Supreme Court, Term No. 180. Superior Bath House Company, Appellant, vs. Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas. Filed June 25, 1940. Term No. 180 O. T. 1940.

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